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66905—34

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

GUARANTY TRUST COMPANY OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above case March 19, 1934, reversing the judgment of the District Court of the United States for the Southern District of New York.

OPINIONS BELOW

The opinion of the District Court (R. 31) is not reported. The opinion of the Circuit Court of Appeals (R. 43) is reported in 69 F. (2d) 799.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 19, 1934. (R. 46.) The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether in the case of a check drawn and payable in this country to a foreign payee, and transferred under a forged endorsement in the foreign country, the rights and obligations of the drawer-drawee and of a subsequent American endorsee are governed by the laws of the foreign country of transfer, or by the laws of the American jurisdiction in which the check was both drawn and payable.

2. Whether the last endorsement made in New York on such check, "previous endorsements guaranteed", imports a guarantee of the genuineness of the prior endorsements as well as a guarantee of title.

STATUTES INVOLVED

These are set forth in the Appendix, *infra,* pp. 11–12.

STATEMENT

The case was presented in the District Court on stipulated facts (R. 12–28), which may be summarized as follows:

A check in the amount of $160, dated October 29, 1921, was drawn in Washington on the Treasurer of the United States, to the order of Louis Macakanja, 37 Sasava Kot Glina, Z. P. Maja, Jugo-Slavia, and mailed to the payee. (R. 13.) The

check bears the purported endorsement of the payee made in Jugo-Slavia, and was transferred and delivered to the Merkur Bank of Jugo-Slavia for a valuable consideration on or about November 30, 1921. (R. 13.) The purported endorsement of the payee is a forgery. (R. 13.) The Merkur Bank received the check in good faith and without being guilty of any negligence (R. 15), and thereafter duly endorsed the check and transferred and delivered it to the Slavenska Bank, D. D., Zagreb, in Jugo-Slavia, for a valuable consideration. (R. 16.) The Slavenska Bank received the check in good faith and without notice of the forgery. (R. 16.) On or about December 3, 1921, the Slavenska Bank endorsed and mailed the check to the defendant, which received it on or about December 21, 1921, in good faith for value and without notice of the forgery. (R. 16–17.) The respondent, upon receipt of the check, stamped its endorsement on the back and presented it to the Federal Reserve Bank of New York for collection. The respondent's endorsement contained the words "previous endorsements guaranteed." (R. 18.) The Federal Reserve Bank sent the check to the Treasurer of the United States for payment. (R. 20.) Upon receipt of the check the Treasurer of the United States paid it by crediting the Federal Reserve Bank of New York with the amount and the Federal Reserve Bank of New York in turn credited the amount to the respondent.

(R. 26.) It was later discovered that the payee's endorsement was forged, and the petitioner thereupon requested reclamation, through the Federal Reserve Bank of New York, from the respondent. (R. 26.)

The law of the Kingdom of Jugo-Slavia in reference to checks and bills of exchange is as follows (R. 17–18):

> Upon the negotiation and transfer of a check or bill of exchange each transferee, endorsee, or holder thereof obtains a good title to the instrument and acquires the right to collect and retain the proceeds thereof, even though the endorsement of the payee is forged where
>
> (a) the instrument purports to bear a chain or series of endorsements from the payee of the instrument to the transferee, holder or endorsee thereof; and
>
> (b) the said transferee, holder or endorsee gives valuable consideration for the instrument; and
>
> (c) the said transferee, holder or endorsee takes the instrument without actual notice of any forgery or other defect in the instrument and is not guilty of any fraud or gross negligence in taking the instrument:

The law of Jugo-Slavia further provides that

> (a) when an endorsement follows a blank endorsement there is a presumption of law that the person who executed the endorsement has acquired title to the instrument under the blank endorsement; and

(b) the transferee, holder or endorsee of the instrument is under no duty or obligation to investigate the genuineness of prior endorsements.

Under the law of Jugo-Slavia an endorser does not guarantee or warrant the genuineness of prior endorsements.

The law, as above stated, was in 1921 and still is in full force and effect in Jugo-Slavia.

The District Court entered judgment in favor of the petitioner for the amount of the check and interest. (R. 32.) The Circuit Court of Appeals reversed.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court.

2. In holding that the law of the place of foreign transfer governs the rights of an endorsee as against the drawer-drawee of an American check.

3. In holding that the respondent's title to the check, although acquired under a forged endorsement, authorized the respondent to demand and receive payment of the check in this country.

4. In holding that respondent's endorsement, "previous endorsements guaranteed," was a guarantee of title merely, and not of the genuineness of prior endorsements.

REASONS FOR GRANTING THE WRIT

1. The question involved is one of public importance the proper solution of which is in doubt.

Many checks drawn on the Treasurer of the United States by various disbursing officers, and innumerable others drawn by private individuals on various banks throughout the United States, are sent annually to payees residing in European countries in which the civil law and not the common law, or law merchant, prevails. The question is whether in such a case a title acquired abroad under a forged endorsement is good in the United States, and will be enforced against the drawer-drawee although contrary to the law of the American jurisdiction where the check was both drawn and payable. The question has never been passed upon by this Court.

2. The decision of the Circuit Court of Appeals is believed to be erroneous.

It is, of course, admitted that under the law of Jugo-Slavia the Merkur Bank acquired title to the check and could hold it, in Jugo-Slavia, against the rightful owner. The question is not simply whether a title so acquired will be honored in this country, but whether it creates an obligation in the American drawer-drawee to make payment, in this country, to a successor of the holder of that title, and whether a subsequent American endorsement, "prior endorsements guaranteed", has any meaning.

I

The law governing the drawer-drawee's contract is the law of the District of Columbia and any subsequent transfer cannot alter these obligations, and

the drawer-drawee remains at all times under the same liability it was under at the time the check was drawn. *Robertson* v. *Burdekin,* 6 Dunlop 17 (Court of Session).

The check was both drawn and payable in the District of Columbia. Where the *lex loci contractus* and the *lex loci solutionis* are identical, there is no question as to what law governs the obligations of a contract. *Hutchison* v. *Ward,* 192 N.Y. 375, 379. The Code of Laws of the District of Columbia (Title 22, Section 24, *infra,* p. 11) provides that where a signature is forged it is wholly inoperative and no right to enforce payment can be acquired under such signature. Section 91 of the same title (*infra,* p. 11) provides that the drawer engages that on due presentment the instrument will be accepted or paid according to its tenor. Although the law of the place of transfer may govern the validity of the transfer and the rights as between the transferees, it cannot enlarge the liability of the drawer-drawee under the laws of a jurisdiction where the check was both drawn and payable. Lorenzen, *The Conflict of Laws Relating to Bills and Notes,* 1919, page 134; *Pritchard* v. *Norton,* 106 U.S. 124, 133; *Orij* v. *Winter,* 4 Martin N.S. (La.) 277.

II

The phrase "previous endorsements guaranteed" is a guarantee of the genuineness of prior endorsements as well as a guarantee of title.

The obligation of the respondent under its contract of endorsement is governed by the law of the place where the contract of endorsement was made, that is, of New York. *Spies* v. *National City Bank,* 174 N.Y. 222, 225. Sections 115 and 116 of the Negotiable Instruments Law of New York (*infra,* pp. 11–12) provide that every endorser who endorses without qualification warrants (1) that the instrument is genuine and in all respects what it purports to be; (2) that he has good legal title to it; and (3) that all prior parties had capacity to contract. If the sole warranty were one of title, there would be no reason for warranties (1) and (3). If an instrument "is genuine and in all respects what it purports to be," the prior endorsements must all be genuine. Where one of the endorsements is forged, the instrument is no longer genuine, for the signatures of all prior parties are inherent factors in the instrument. The holding of the Circuit Court of Appeals amounts to a ruling that all subsections of Section 115 of the Negotiable Instruments Law of New York, except Subsection 2, are mere verbiage. Obviously they are not intended to be such, and the only way in which all the subsections of Section 115 can be given legal significance is to hold that the endorser warrants that all prior signatures, including endorsements, are genuine.

The courts of New York have held, under this section, that an endorser guarantees the genuineness of the signature of prior endorsers. *Packard*

v. *Windholz,* 84 N.Y.Supp. 666, 667, affirmed, 180 N.Y. 549; *Oriental Bank* v. *Gallo,* 98 N.Y.Supp. 561, 563, affirmed, 188 N.Y. 610; *Geering* v. *Metropolitan Bank,* 156 N.Y.Supp. 582, 583, affirmed, 225 N.Y. 711. This Court has followed the same rule without the aid of the statute, *United States* v. *National Exchange Bank,* 214 U.S. 302, 319, as the Court of Appeals of New York did before the statute was passed. *Turnbull* v. *Bowyer,* 40 N.Y. 456, 460. If there were any doubt about the effect, in that respect, of a simple general endorsement, it would seem to be removed by the special stamping "prior endorsements guaranteed." The Treasury Department circular in force at the time (R. 20–23) required that checks on the Treasurer of the United States, presented to Federal Reserve Banks for payment, must be "properly indorsed by responsible incorporated banks and trust companies who guarantee all prior indorsements thereon." The respondent had knowledge of this circular when it dealt with the check in question (R. 26) and the form of its endorsement (if differing at all from that commonly in use by it) was evidently directed to the requirements of the circular. The words "prior endorsements guaranteed" can only mean one thing. They are not a warranty of title, which is warranted by the mere fact of transfer, but are a guarantee of "prior endorsements"; that is, of their genuineness. In the language of the Circuit Court of Appeals, a bank endorsing in this form

warrants "the authenticity of the penmanship" of prior endorsements, quite as much as its own title.

III

The payee's endorsement having been forged, and the check having been paid under a mistake as to the genuineness of the signature of the payee, the amount of the check is recoverable by the United States from the respondent. *United States* v. *National Exchange Bank,* 214 U.S. 302; *United States* v. *Chase National Bank,* 252 U.S. 485, 493; *First National Bank* v. *Whitman,* 94 U.S. 343.

Wherefore it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

J. CRAWFORD BIGGS,
Solicitor General.

JUNE 1934.

APPENDIX

STATUTES

Title 22, Sections 24 and 91, of the Code of Laws of the District of Columbia provides as follows:

Section 24.

> Where a signature is forged or made without the authority of the person whose signature it purports to be it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.

Section 91:

> The drawer, by drawing the instrument, admits the existence of the payee and his then capacity to indorse, and engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor, and that if it be dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it. * * *

Section 116 of the Negotiable Instruments Law of New York provides as follows:

> Every endorser who indorses without qualification, warrants to all subsequent holders in due course:

(1) The matters and things mentioned in subdivisions one, two and three of the next preceding section; and,

(2) That the instrument is at the time of his endorsement valid and subsisting.

The "matters and things mentioned in subdivisions one, two and three" of Section 115 are as follows:

(1) That the instrument is genuine and in all respects what it purports to be;

(2) That he has a good title to it;

(3) That all prior parties had capacity to contract.

U. S. GOVERNMENT PRINTING OFFICE: 1934